

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 17 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|--------------------------------|---|----------------------------|
| In re |) | 2 CA-CV 2011-0155 |
| |) | DEPARTMENT B |
| ONE 1999 CHEVROLET SUBURBAN, |) | |
| 3GNEC164R8XG263603; ONE 1979 |) | <u>MEMORANDUM DECISION</u> |
| OLDSMOBILE CP, 3R47F9R500724; |) | Not for Publication |
| and \$14,706 IN U.S. CURRENCY. |) | Rule 28, Rules of Civil |
| |) | Appellate Procedure |
| _____ |) | |

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CV201005141

Honorable Boyd T. Johnson, Judge

VACATED AND REMANDED

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K E L L Y, Judge.

¶1 In this forfeiture case, the State of Arizona appeals from the trial court’s ruling following a probable cause hearing, and appellees Christy and Gilbert Dozal cross-appeal. The state argues that because the court erred by applying the preponderance-of-evidence standard of proof at the probable cause hearing, its finding that certain property was not subject to forfeiture was erroneous. In their cross-appeal, the Dozals assert the portion of the ruling forfeiting their property was erroneous because the court did not have authority to order forfeiture at a probable cause hearing. For the reasons that follow, we vacate the court’s ruling and remand this matter for further proceedings.

Background

¶2 The relevant facts are largely undisputed. Following the seizure of several items of personal property, the Dozals filed a “Claim Against Property” and “Petition for Order to Show Cause.” The trial court granted their petition and ordered the state to establish the existence of probable cause that the property was subject to forfeiture. Due to each party’s request for a change of judge and various continuances, the hearing was not concluded until about eight months after the Dozals had filed their claim and petition. The court then ruled some of the items were forfeited but others should be returned to the Dozals. This appeal and cross-appeal followed.

Discussion

¶3 The state argues that the trial court erred in its ruling on the order to show cause because it applied a preponderance-of-the-evidence standard, rather than the

statutorily imposed probable-cause standard.¹ Because the issue involves questions of law regarding the interpretation of statutes applicable to forfeiture proceedings, *see In re \$3,636.24 U.S. Currency*, 198 Ariz. 504, ¶ 10, 11 P.3d 1043, 1044 (App. 2000), our review is de novo, *In re \$24,000.00 U.S. Currency*, 217 Ariz. 199, ¶ 12, 171 P.3d 1240, 1243 (App. 2007).

¶4 In response to the Dozals' petition, the trial court ordered the state, to "appear and show probable cause" exists for the forfeiture of the property "pursuant to A.R.S. § 13-4310([B])."² But, in its under advisement ruling, the court did not make findings on whether there was probable cause to believe the Dozal's property was subject to seizure. Rather, addressing the merits of the action, it found that "it is the State's burden of establishing by a preponderance of the evidence that each item of property is subject to forfeiture pursuant to law." Applying this standard, the court found the state had failed to establish that certain property was subject to forfeiture. The court then

¹The Dozals claim the state has waived this argument because it did not ask the trial court to "limit its decision to the narrow issue of probable cause." But, as stated below, the Dozals requested, and the court ordered, only that the state show there was probable cause to believe the property was subject to forfeiture. The Dozals have not explained why, under these circumstances, the state would be required to object on this ground in order to preserve its argument. The Dozals also appear to assert that waiver should apply because the state did not object to the length of time that passed between the petition to show cause and the conclusion of the probable cause hearing. But the state does not argue that the court failed to complete the hearing in a timely manner. Rather, its argument is based on the substance of the court's ruling. Therefore, we conclude the state's claim has not been waived.

²The trial court's minute entries also refer to the matter as a "probable cause hearing."

found the remaining property was subject to forfeiture and ordered it forfeited to the state.

¶5 To the extent the trial court applied a preponderance-of-the-evidence standard in determining whether probable cause existed, we agree with the state that this constituted error. *See* § 13-4310(B) (court determines whether probable cause exists); *In re \$24,000.00 U.S. Currency*, 217 Ariz. 199, ¶ 11, 171 P.3d at 1243 (defining probable cause in forfeiture context as reasonable grounds, supported by more than mere suspicion, to believe property is subject to forfeiture).³ However, based on the record before us, it appears the court did not address the issue of probable cause but instead ruled on the merits of the forfeiture action. This is not permitted within the limited context of a § 13-4310(B) hearing.⁴ *See State ex rel. Woods v. Filler*, 169 Ariz. 224, 226, 818 P.2d 209, 211 (App. 1991) (“The order to show cause hearing is a preliminary hearing only and not a trial on the merits.”); *see also* A.R.S. § 13-4311(H) (providing for discovery prior to hearing on merits).⁵ Therefore, the Dozals are correct that the court erred by ordering forfeiture of certain items of their property at the probable cause hearing.

³The Dozals do not contest that the appropriate standard of proof at a § 13-4310(B) hearing is probable cause.

⁴For this reason, we likewise reject the Dozals’ assertion that the court was permitted to sua sponte “treat[] the . . . hearing as one on the merits.”

⁵The Dozals argue that because the state has not submitted transcripts of the proceedings, we must presume the record of the probable cause hearing supported the trial court’s findings. *See Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005). But, even assuming the record supports the court’s findings, as discussed, the error is procedural, and is not, therefore, dependent on a transcript of the proceedings.

Disposition

¶6 The trial court's ruling is vacated, and the case is remanded for proceedings consistent with this decision.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge